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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

CLAUDINE W. JORDAN,

Petitioner,

v.

TOYOTA MOTOR CREDIT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under the Consumer Leasing Act and Regulation M, does the phrase "clear and conspicuous manner" contain an understandability or meaningfulness element as the Second and Third Circuits have held, or does the phrase mean merely "visible" as the Seventh Circuit has held?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Schaumburg Toyota, a corporation organized and existing under the laws of the State of Illinois, was a party to the original proceeding in the trial court. The claims involving Schaumburg Toyota were settled and are not involved in this petition.

There are no parent or subsidiary companies to be listed.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, (A. 24-27), is published at 236 F.3d 866 (7th Cir. 2001). The opinions and orders entered by the trial court, (A. 1-24), are not published.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2001. This Petition has been timely filed, within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are:

Consumer Leasing Act, Section 181a(11), 15 U.S.C. § 1667a(11):

§ 1667a, Consumer lease disclosures

Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early

termination.

Regulation M, 12 C.F.R. § 213.3(a)(1):

1. General requirements. A lessor shall make the disclosures required by § 213.4, as applicable. The disclosures shall be made clearly and conspicuously in writing in a form the consumer may keep, in accordance with this section.

Regulation M, 12 C.F.R. § 213.4(g)(1):

Section 213.4 Content of disclosure.

For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable:

(g) Early termination.

(1) Conditions and disclosure of charges. A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term; and the amount or a description of the method for determining the amount of any penalty or other charge for early termination, which must be reasonable.

STATEMENT OF THE CASE

On February 7, 1997, Claudine Jordan entered into an automobile lease agreement with Toyota Motor Credit Corporation, ("Toyota"). (A. 3.) Jordan was one of approximately 4.91 million consumers who signed auto leases that year. Perry Brothers, *Auto Leases Clearer with New Rules*, CINN. ENQ. Jan. 19, 1998 at 19. Today, leasing accounts for over one third of new vehicle acquisitions. Kathleen W. Johnson, *Credit Constraints, Consumer Leasing and the Automobile Replacement Decision* at 2, Board of Governors of the Federal Reserve System Working Paper (1996).

One of the terms of Jordan's lease was a provision governing early termination of the lease, (A. 3), a disclosure required by Section 1667a(11) of the Consumer Leasing Act. *See* 15 U.S.C. § 1667a(11). According to the California Department of Consumer Affairs, the cost of terminating a lease early is the biggest disadvantage of leasing. State of California Department of Consumer Affairs, *Understanding Consumer Vehicle Leases*, Legal Guide L-6 at 6 (1998). Early termination fees can be as high as several thousand dollars. *Id.* Reasonable consumers would probably not enter into a lease agreement if they realized that they would have to pay thousands of dollars in penalties if they got sick or lost their job and were unable to complete the lease.

In the case below, the early termination fee could not be calculated based on the information contained in the lease. Jordan's lease provided two options for terminating the lease before the end of the 36-month lease term. So long as Jordan was not in default, she could either (1) purchase the vehicle and pay Toyota "the Amount Due on Early Termination," or (2) pay "the Amount Due on Early Termination" minus "the Fair Market Value" of the vehicle. (A. 3-4.) The lease provided the

following method for computing the "Amount Due on Early Termination":

> **The Amount Due on Early Termination**: the Amount Due on Early Termination is the sum of a through d minus e.
>
> a. Any unpaid Monthly Payments then due;
>
> b. Any other amounts you are obligated to pay under this Lease;
>
> c. Any official fees and taxes owing or imposed in connection with lease termination;
>
> d. The Adjusted Capitalized Cost (Paragraph 6);
>
> e. All depreciation amounts in the Base Monthly Payments that have come due (Paragraph 28).

(A. 4.) Nowhere in this provision is a method of calculation named. Moreover, although paragraph 26(d) of the lease states that "The Adjusted Capitalized Cost" is located in "Paragraph 6" of the lease, paragraph 6 is actually labeled "Residual Value." (A. 4.) In fact, the "Adjusted Capitalized Cost" provision is found in paragraph 5 of the lease. (A. 4.) Paragraph 28 of the lease – which is referred to in section "e" of Paragraph 26, and which is involved in calculating early-termination penalties – is entitled "Depreciation Amounts," and it reads as follows:

> **Depreciation Amounts:** Each Base Monthly Payment consists of Lease Charge and depreciation. Lease Charge is earned by us on a "constant yield" basis. The Lease Charge part of each Base Monthly Payment is determined

by:

a. Adding the remaining depreciation balance and the Residual Value;

b. Subtracting from that sum an amount equal to 1 Base Monthly Payment; and

c. Multiplying the difference in step b above by the constant rate which will amortize the Total Depreciation over the Lease Term by the payment of the Base Monthly Payments.

(A. 5.) The part of each Base Monthly Payment not allocated to Lease Charge is credited to depreciation. At any given time, the "remaining depreciation balance" is the difference between the Total Depreciation and all depreciation amounts in the Base Monthly Payments that have come due. (A. 5.)

The problem with the early-termination provision contained in the Lease was that the "constant rate which will amortize the Total Depreciation over the Lease Term," as described in subparagraph c. of the "Depreciation Amounts" section, was not provided and was known only by Toyota Motor Credit Corporation. This made calculation of the early-termination fee impossible using the information contained in the Lease.

Based on the incalculable nature of the early-termination provision, Jordan filed a four-count complaint against both Schaumburg Toyota and Toyota Motor Credit Corporation, alleging violations of the Consumer Leasing Act and the Illinois Consumer Fraud Act. Schaumburg Toyota settled its dispute with Jordan. Moreover, Jordan does not appeal from the dismissal (on summary judgment) of Count II of her Complaint

against Toyota.

The issue in this petition is limited to that raised in Count I of the Complaint against Toyota Motor Credit Corporation. In that count, Jordan alleged that Toyota Motor Credit Corporation violated the CLA by failing to "clearly and fully disclose the early termination penalty and the method for making this determination." (A. 6.) Relying on *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), the district court granted Toyota's motion to dismiss for failure to state a claim upon which relief could be granted. The Seventh Circuit affirmed the dismissal, holding that so long as a method is named in the lease, additional disclosures explaining the method need not be comprehendible or even accurate. *Jordan v. Toyota Motor Credit Corporation*, 236 F.3d 866, 868 (7th Cir. 2001)(App. 24-27).

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Holdings in the Case below and in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), Conflict with the Holdings of the Second and Third Circuits, the Federal Reserve Board, and Other Statutory Enactments That Contain Clear-and-Conspicuous-Disclosure Requirements.

Disclosure is the hallmark of consumer protection. By requiring that consumers be reasonably informed with respect to the terms of purchase transactions, a positive effect is had on the overall consumer market. *See* Schwartz and Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630 (1979). To facilitate this positive effect and to protect consumers from uninformed decision making with respect to purchases, Congress has enacted a series of consumer protection statutes

which require that consumers be accurately informed with respect to the terms of credit transactions in which they enter.

The Truth in Lending Act, ("TILA"), imposes mandatory disclosure requirements on those who extend credit to consumers in the American market. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 363 (1973). The TILA was enacted to remedy a situation in which consumers, who were frequently ignorant as to the nature of their credit obligations and the cost of deferring payment, were taken advantage of by creditors who had no obligation to accurately inform them of credit terms *Id.* at 363-64.

Due to a "continued trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales," 15 U.S.C. § 1667f historical and statutory note, *see also* Perry Brothers, *Auto Leases Clearer with New Rules* at 19 (4.91 million leases in 1997), the Consumer Leasing Act, ("CLA"), was enacted in 1976. The CLA extended the TILA's credit disclosure requirements to consumer leases. Its primary purpose is to "assure meaningful disclosure of the terms of leases ... so as to enable the lessee to compare more readily the various lease terms available to him." 15 U.S.C. § 1601(b).

The CLA requires that certain lessors of personal property make specific disclosures in connection with a lease transaction. *See* 15 U.S.C. § 1667a. These disclosures must be given in a "clear and conspicuous manner." *Id.*

The CLA requires the Federal Reserve Board to issue regulations "to update and clarify the requirements and definitions applicable to lease disclosures." 15 U.S.C. § 1667f(a)(1). The Federal Reserve Board regulations are codified as Regulation M, 12 C.F.R. Part 213. As the

commentary to Regulation M points out, "[t]he clear and conspicuous standard requires that disclosures be reasonably understandable." 12 C.F.R. § 213.4(a)(1) commentary (1999).

Despite the clear guidance of the Federal Reserve Board, a conflict has arisen between the circuits with respect to the meaning of the phrase "clear and conspicuous manner." *Compare* the opinion below, *Jordan v. Toyota Motor Credit Corp.*, 236 F.3d 866 (7th Cir. 2001)("clear and conspicuous" means merely visible)(A. 24-27); *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996)(same); *with Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000)(while "conspicuous" may mean merely visible, "clear" entails some degree of understandability); and *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993)(disclosures must be reasonably understandable); *see also Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 879 (10th Cir. 1992)("clear and conspicuous" in TILA context requires "meaningful disclosure").

The Third Circuit held in *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000), that "clear and conspicuous manner," as interpreted by the Federal Reserve Board, means not only visible, but also reasonably understandable. *Id.* at 220. Because the language of the statute is ambiguous, the Third Circuit properly considered the Federal Reserve Board's interpretation of the provision. *Id.*; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)("judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational."). The Second Circuit, in *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993), reached a similar

holding. *Id.* at 15.

On the other hand, the Seventh Circuit held in the case below and in *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), that "clear and conspicuous" has a single, undivided meaning under which disclosures need not be understandable; rather they must merely be "visible." *Jordan*, 236 F.3d at 867; *Channell*, 89 F.3d at 382.

The conflict between the Circuits is irreconcilable. By refusing to hold that elements of both visibility and understandability exist in the context of the phrase "clear and conspicuous manner" within the meaning of the CLA, the Seventh Circuit has embarked on a "voyage without a compass," *see Milhollin*, 444 U.S. at 568, a course which conflicts with the more reasoned holdings of other circuit courts of appeal.

Only this Court can resolve the conflict among the Circuits and settle this issue that is of great importance to millions of consumers nationwide and the nation's continually-expanding credit economy.

II. This Court must Resolve the Conflict Created by the Seventh Circuit with Respect to the Meaning of the Phrase "Clear and Conspicuous Manner."

The Second and Third Circuits, unlike the court below, correctly decided that "clear and conspicuous" involves an element of understandability, not mere visibility. The CLA requires that disclosures be made in clear and conspicuous manner. 15 U.S.C. § 1667a. Although the Act does not itself define the term "clear and conspicuous manner," the Federal Reserve Board Commentary explains that "clear and conspicuous manner" means "in a reasonably understandable

form." 12 C.F.R. § 213.4(a)(1) commentary (1999).

In *Applebaum*, the Third Circuit properly deferred to the Federal Reserve Board and held that disclosures must be reasonably understandable to comply with the CLA. 226 F.3d at 220. *See Milhollin*, 444 U.S. at 568. This is not to say that the disclosure must be within the understanding of the average consumer: "what is reasonable depends on the surrounding circumstances." *Applebaum*, 226 F.3d at 220. But "'understandable' means more than 'legible'; many things are legible [or visible] but not understandable." *Id.*

The court in *Applebaum* held that naming the "constant yield method" as the method used for discounting to present value for purposes of the early-termination provision in a lease satisfied the "reasonably understandable" requirement of the CLA because the information could be "put to use." *Id.* at 221.

But the court also held that disclosure of the early-termination provision in a lease must include more than merely a reference to the phrase "residual value" where the value of a variable that is an essential component of the formula used in calculating the penalty is missing; the value of the variable must also be disclosed for the early-termination provision to be reasonably understandable. *Id.* at 223. Without disclosing the value of the variable, the information contained in the early-termination provision could not be put to use and, therefore, was not reasonably understandable:

> [A]n early termination clause that fails to reveal an otherwise unknowable variable used in determining an early termination penalty cannot be regarded as 'reasonably understandable' in any meaningful sense of the term. *Id.*

In *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993), the Second Circuit similarly held that lease disclosures violated the CLA because they were not "reasonably understandable":

> We agree with the district court that the Security Pacific lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer. *Id.* at 15.

Unlike the well-reasoned holdings of the Second and Third Circuits, however, the Seventh Circuit ignored the Federal Reserve Board's guidance in deciding both the case below and *Channell*. The Seventh Circuit correctly noted in *Channell* that a revision of Regulation M states that a lessor may comply with the requirements of the CLA by "includ[ing] a reference to the name of a generally accepted method of computing the unamortized gross or capitalized cost [] portion of its early termination charge." 89 F.3d 379, 382. As such, held the court, the defendant's reference to the Rule of 78s constituted compliance with the CLA because "clear and conspicuous manner" means "*visible*, not *simple*." *Id.* (Emphasis in original).

But while the Seventh Circuit's approach may have had an appropriate result in *Channell*, the approach itself and the court's reasoning was seriously flawed. Utilization of that same approach and reasoning in the case below had an absurd result. Following its holding in *Channell*, the Seventh Circuit held that referencing the name of a method for calculating early-termination charges results in compliance even if the lessor also attempts to explain the method and does so inaccurately and in a positively confusing manner. *See Jordan v. Toyota Motor*

Credit Corp., 236 F.3d 866 (7th Cir. 2001).

In the case below, the Seventh Circuit proclaimed to follow *Applebaum*, but it ignored the requirement that disclosures be reasonably understandable. Though referencing the name of a method (although not in the paragraph describing early termination), the lease also contained a purported step-by-step formula for determining the early-termination charge. The problem was that the information could not be put to use because information possessed only by the lessor was crucial to the calculation was not provided; as such, the early-termination charge was impossible to calculate based on the information provided. *See Jordan*, 236 F.3d at 867. Despite this gobbledygook obfuscation of the method for determining the early-termination charge, the Seventh Circuit held that so long as a method is named, an unsuccessful attempt to explain the method could never cause the disclosure to not be "clear and conspicuous."

Jordan presented the lease to a mathematician to see if the early-termination fee could be determined using Toyota's disclosed formula. (App. 12-13.) Although the mathematician was able to calculate the fee using differential calculus, he concluded that it was impossible to determine the early-termination fee based on the information contained in the Lease because an important constant value, namely the "constant rate which will amortize the Total Depreciation over the Lease Term," is not provided. This conclusion was also supported by the testimony of an auto-industry expert who concluded it was impossible for an average consumer to calculate the early termination penalty using only a paper, pencil and standard calculator.

This does not mean, however, that it is impossible to reach the correct answer – it just cannot be done by following

Toyota's instructions or using conventional methods. Instead, it requires a mathematician with an extensive math and computer background to independently solve for the missing constant using esoteric techniques of differential calculus such as Newton's Method.

The early-termination provision in the case below, (in which the words "'constant yield' basis" are buried), is similar to the provision in *Applebaum* in that information necessary for the computation of the early-termination fee was missing from the disclosure. While the Seventh Circuit correctly noted that a method was named in the provision in the case below, that is not all that is required for a disclosure to be "clear and conspicuous." Where a disclosure is not also reasonably understandable, it does not meet the clear-and-conspicuous requirement.

Toyota's lease in the case below does not simply name a method. Instead, it sets forth a series of indecipherable and incomprehensible linguistic mazes. The Toyota lease entirely undermines the public policy concerns that justified the holding in *Channell*. The addition of "technical information" and "indigestible matter" really "distracts attention from the rest of the disclosures" and makes it "hard for consumers to find what they really care about." *See Channell*, 89 F.3d at 382. As such, the standard set by *Channell* is not workable and, unless corrected by this Court, will have inconsistent and unjustified results in future cases under the CLA, as well as in cases involving other statutes containing clear-and-conspicuous requirements.

Many other federal statutes utilize the phrase "clear and conspicuous" with respect to the manner of disclosing information. *See, e.g.*, 11 U.S.C. § 524; 12 U.S.C. § 1795f; 12 U.S.C. § 1831e; 12 U.S.C. § 2063; 12 U.S.C. § 2803; 15 U.S.C.

§ 68b; 15 U.S.C. § 2302; 15 U.S.C. § 2803; 18 U.S.C. § 2710; 39 U.S.C. § 3009; 42 U.S.C. § 767j; 47 U.S.C. § 551. In addition, courts interpreting the clear-and-conspicuous-disclosure requirements contained in these other statutes turn to the TILA for guidance in interpreting the meaning of the phrase "clear and conspicuous." *See Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 880 (10th Cir. 1992)(looking to TILA to interpret clear-and-conspicuous-disclosure requirement contained in Cable Communications Policy Act). In *Scofield*, decided prior to *Channell*, the court, relying on the TILA, held that the phrase "clear and conspicuous" within the Cable Communications Policy Act meant that the disclosure should at least be such that the subscriber "could reasonably be expected to have ... understood its meaning." *Id.* The holding in *Scofield* is consistent with the *Applebaum/Lundquist* interpretation of "clear and conspicuous," but may not have been if the issue in *Scofield* had been decided today.

The court in *Scofield* stressed that meaningful disclosure does not mean more disclosure; too much information can be as bad as too little. *Scofield*, 973 F.2d at 880; *see also Channell*, 89 F.3d at 382 (*citing Milhollin*, 444 U.S. at 568). In this regard, the Seventh Circuit's holding in the case below that, as long as a method is named it does not matter that additional information obfuscates the disclosure, is further undermined.

Cases involving interpretations of clear-and-conspicuous-disclosure provisions will likely continue to arise in the future and courts will likely continue to rely on TILA interpretations for guidance. As such, it is vitally important that the meaning of the phrase be resolved.

As it stands, courts within the Seventh Circuit must dismiss CLA claims in which a method of disclosure is named somewhere in the lease even though the lease is otherwise

indecipherable and even though the relationship of the named method and the gobbledygook explanation of that method cannot be discerned. On the other hand, if Jordan had brought her claim in either the Second or Third Circuit she would have stated a claim. Along these same lines, the conflict among the Circuits also causes difficulty and uncertainty for leasing companies who must currently abide by varying disclosure standards depending on what area of the country they are doing business.

Courts interpreting clear-and-conspicuous-disclosure provisions contained in similar provisions will also consider themselves bound by this precedent. As such, the implications of the error committed by the Seventh Circuit in *Channell* and subsequently in the case below may be severe if uncorrected.

III. Conclusion.

For all of the reasons stated above, we urge the Court to grant a Writ of Certiorari to review the opinion in this case so that the Court may resolve the conflict among the Circuits presented herein and introduce some certainty into an area of the law which has a profound impact on the nation's credit economy.

Respectfully submitted,
CLAUDINE W. JORDAN,
Plaintiff/Petitioner,

CHRISTOPHER V. LANGONE
Attorney for Plaintiff/Petitioner

Dated: April 9, 2001

APPENDIX

CLAUDINE W. JORDAN, on behalf of herself and all others similarly situated, *Plaintiff*,

v.

SCHAUMBURG TOYOTA and TOYOTA MOTOR CREDIT CORPORATION, *Defendants*.

Case No. 97 C 6697

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 2553

February 24, 1999, Decided

February 26, 1999, Docketed

MEMORANDUM OPINION AND ORDER

This lawsuit arises out of a dispute over the terms of an automobile lease and whether the terms of that lease comply with federal and state law. Plaintiff Claudine Jordan n1 ("Jordan") filed a file a four-count complaint against defendants Schaumburg Toyota ("Schaumburg") and Toyota Motor Credit Corporation ("Toyota") alleging that her automobile lease violates the federal Consumer Leasing Act, *15 U.S.C. § 1667* et seq. ("CLA"), and the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS § 505 et seq. ("ICFA"). Jordan settled her dispute with Schaumburg and dismissed her allegations against Schaumburg. Accordingly, Toyota is the only remaining defendant in this suit.

n1 Jordan brings this lawsuit both for herself and as a class action; however, the court denied Jordan's initial motion for class certification without prejudice pending resolution of the motions currently before the court.

Of the four counts in Jordan's complaint, only counts I and II assert claims against Toyota. In count I, Jordan alleges that Toyota violated the CLA by failing to "clearly and fully disclose the early termination penalty and the method for making this determination." (Compl. at P 26.) Jordan contends in count II that Toyota violated the CLA by failing to "properly indicate the payment that was made at the consummation of the lease agreement (i.e., the trade in)." (Id. at P 28.) Jordan also maintains in count II that Toyota violated the CLA because her automobile lease "fails to properly disclose both a total of 'other' charges and an itemization of these charges." (Id. at P 29.)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Toyota has moved to dismiss counts I and II of Jordan's complaint for failure to state a claim upon which relief can be granted. In response to Toyota's Rule 12(b)(6) motion, Jordan filed a cross-motion for summary judgment on count I of her complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. Rather than oppose Jordan's cross-motion for summary judgment on the merits, Toyota moved to strike Jordan's cross- motion for summary judgment. For the following reasons, the court grants in part and denies in part Toyota's motion to dismiss counts I and II of Jordan's complaint. The court also denies Jordan's motion for summary judgment without prejudice because it is premature. Finally, the court denies Toyota's motion to strike Jordan's cross-motion for summary judgment as moot.

Background

On February 7, 1997, Jordan went to Schaumburg's automobile dealership and entered into an automobile lease agreement with defendant Toyota Motor Credit Corporation ("Toyota"). (Compl. at P 9.) Under the terms of the lease, Jordan took possession of a 1997 Toyota Camry automobile and promised to make 36 monthly payments of $ 359.82 for a total of $ 12,953.52. n2 (Lease at PP 9, 10, 12, 13.) As a part of the deal, Jordan traded in her old car, a 1993 Toyota Corolla, which she had also leased. (Compl. at PP 10, 13.) The lease provided that the trade-in value of Jordan's 1993 Corolla was $ 0. (Lease at P 14(b)(2).)

n2 Strangely, Jordan's complaint alleges that "the term of the lease was for 48 months" at a "total cost to her" of "$ 22,201.01." (Compl. at PP 12, 14.) The lease itself, however, contradicts these allegations. The lease, which Jordan attached as Exhibit A to her complaint, provides for a duration of 36 months at monthly payments of $ 359.82 for a total value of $ 12,953.52. Given the factual discrepancy between the allegations in the complaint and the document upon which Jordan bases her complaint, the court must accept the facts in the lease. See *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co., 927 F.2d 988, 991 (7th Cir. 1991).*

Among the many terms of Jordan's lease agreement was a provision governing early termination of the lease. Specifically, the lease provided Jordan with two options for terminating the lease before the end of the 36 month lease term. So long as Jordan was not in default, Jordan could either (1) purchase the vehicle and pay Toyota "the Amount Due on Early

Termination," or (2) pay "the Amount Due on Early Termination" minus "the Fair Market Value" of the vehicle. (Lease at P 25.) The lease provided the following method for computing "the Amount Due on Early Termination:"

Amount Due on Early Termination: The Amount Due on Early Termination is the sum of a through d minus e.

a. Any unpaid Monthly Payments then due;

b. Any other amounts you are obligated to pay under this Lease;

c. Any official fees and taxes owing or imposed in connection with lease termination;

d. The Adjusted Capitalized Cost (Paragraph 6)

e. All depreciation amounts in the Base Monthly Payments that have come due (Paragraph 28).

(Lease at P 26.) Although paragraph 26(d) of the lease states that "The Adjusted Capitalized Cost" is located in "Paragraph 6" of the lease, paragraph 6 is actually labeled "Residual Value." In fact, the "Adjusted Capitalized Cost" provision is found in paragraph 5 of the lease and specifically refers back to the "Amount Due on Early Termination" in paragraph 26. n3 The Lease defines the "Adjusted Capitalized Cost" as:

Adjusted Capitalized Cost. The agreed upon amount which serves as the basis for determining the Base Monthly Payments. If you are not in default, this amount plus any applicable early termination charge determines your maximum early termination obligation.

(Lease at P 5.)

n3 This discrepancy appears to be a typographical error.

Paragraph 28 of the lease, entitled "Depreciation Amounts," reads as follows:

Depreciation Amounts: Each Base Monthly Payment consists of Lease Charge and depreciation. Lease Charge is earned by us on a "constant yield" basis. The Lease Charge part of each Base Monthly Payment is determined by:

a. Adding the remaining depreciation balance and the Residual Value;

b. Subtracting from that sum an amount equal to 1 Base Monthly Payment; and

c. Multiplying the difference in step b above by the constant rate which will amortize the Total Depreciation over the Lease Term by the payment of the Base Monthly Payments.

The part of each Base Monthly Payment not allocated to Lease Charge is credited to depreciation. At any given time, the "remaining depreciation balance" is the difference between the Total Depreciation and all depreciation amounts in the Base Monthly Payments that have come due.

(Lease at P 28.) Based on the terms of her lease, Jordan filed a four-count complaint against both Schaumburg and Toyota, alleging violations of the CLA and ICFA. n4 As noted, since Schaumburg has settled its dispute with Jordan, and only counts

I and II assert claims against Toyota, the court will only consider the viability of counts I and II.

n4 The only ICFA claims in the case were directed at Schaumburg. Since Schaumburg settled with Jordan, only CLA claims remain in the lawsuit.

In count I, Jordan alleges that Toyota violated the CLA by failing to "clearly and fully disclose the early termination penalty and the method for making this determination." (Compl. at P 26.) Jordan contends in count II that Toyota violated the CLA by failing to "properly indicate the payment that was made at the consummation of the lease agreement (i.e., the trade in)." (Id. at P 28.) Jordan also maintains in count II that Toyota violated the CLA because her automobile lease "fails to properly disclose both a total of 'other' charges and an itemization of these charges." (Id. at P 29.)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Toyota moves to dismiss counts I and II of Jordan's complaint against it for failure to state a claim upon which relief can be granted. Jordan, on the other hand, moves the court to enter summary judgment in her favor on count I of her complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. Toyota reacted to Jordan's motion for summary judgment by moving to strike the cross motion for summary judgment. The court will address each of these motions separately.

Analysis

I. Toyota's Rule 12(b)(6) Motion to Dismiss

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Toyota moves the court to dismiss counts I and II of Jordan's complaint for failure to state a claim upon which relief can be granted. A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399, 1406 (N.D. Ill. 1996)* (citing *Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).* Therefore, the court accepts as true all inferences in favor of the plaintiff. *Zinermon v. Burch, 494 U.S. 113, 118, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990); Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996)* (citation omitted). The court will dismiss a claim only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." *Colfax, 79 F.3d at 632* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).*

All of Jordan's claims against Toyota allege violations of the CLA. Congress enacted the CLA in 1976 as an amendment to the Truth in Lending Act, *15 U.S.C. § 1601*(b) ("TILA"), and it extended the TILA's mandate of "meaningful disclosures" in consumer credit purchases to consumer leases. Just as the TILA requires"meaningful disclosure of credit terms so that the consumer may compare ... various credit terms," *15 U.S.C. § 1601*(a), the CLA requires lessors to make those disclosures necessary to "enable the lessee to compare more readily the various lease terms available to him." *15 U.S.C. § 1601*(b). However, "meaningful disclosure does not mean more disclosure," *Ford Motor Credit Corp. v. Milhollin, 444 U.S. 555, 562, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980),* and when analyzing claims brought under either statute, courts should

attempt to balance "considerations of complete disclosure ... and the need to avoid ... [informational overload.]" Id. at (quoting S. Rep. 96-73, p.3 (1979)).

Toyota first argues that the court should dismiss count I of Jordan's complaint because Jordan does not have standing to assert the claim. Toyota maintains that Jordan lacks standing to make this claim because she has not terminated her lease, nor alleged an intention to do so. Jordan responds that she does have standing because count I alleges that Toyota failed to properly disclose the terms of her lease. The court agrees with Jordan.

In count I, Jordan contends that Toyota violated the CLA by failing to "clearly and fully disclose the early termination penalty and the method for making this determination." (Compl. at P 26.) Where a plaintiff asserts, as Jordan does here, that lease disclosures violate the CLA, the plaintiff need not terminate the lease to have standing. *Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 273 (7th Cir. 1998)* (plaintiff alleging CLA disclosure violations had justiciable claim); *Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 438-9 (7th Cir. 1994)* (analyzing a claim alleging CLA disclosure violation even though plaintiff did not terminate lease). The logic for this rule is rather simple. The CLA requires lessors to fully and truthfully disclose certain terms of a lease so that consumers can make informed choices. See generally, *Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 381-82 (7th Cir. 1996).* If a lease does not properly disclose its terms, then consumers that rely on those untruthful or incomplete terms when deciding whether to enter into the lease necessarily make an uninformed decision. Therefore, the harm to the consumer for a CLA disclosure violation occurs when the consumer relies on the inaccurate disclosure and executes a lease without full and truthful information. Because the misinformed consumer suffers an injury simply by entering the lease agreement, that

consumer has standing to assert a CLA failure to disclose violation regardless of what acts the consumer or the lessor took after the parties executed the lease.

Contrary to Toyota's argument, the mere fact that an allegedly inaccurate term in a lease happens to govern the procedures or penalties imposed for early termination of that lease does not mean that the consumer has to terminate the lease to have standing to allege a CLA disclosure violation. As the court explained, the consumer suffers the harm of a disclosure violation when she relies on the improper disclosure and enters the lease, not when she seeks to trigger the inaccurate clause. Therefore, the court concludes that Jordan has standing to assert her CLA disclosure violation in count I.

Toyota relies heavily on dicta in a footnote from *Wiskup v. Liberty Buick, Inc., 953 F. Supp. 958 (N.D. Ill. 1997)* in support of its standing argument. In Wiskup, the court assumed that the plaintiff lacked standing to allege a disclosure violation based on an early termination clause that applied only to the first twelve months of a lease. *Id. at 962 n.6.* The Wiskup court decided that the plaintiff lacked standing because the clause applied only during the first twelve months of the lease and the plaintiff did not challenge the clause until the seventeenth month of the lease. Id. In making this observation, however, the court noted that "neither party ... briefed this issue." Id. Additionally, the court provided no other explanation for its conclusion and did not support its decision with any statutory authority or case law. Here, the clear weight of Seventh Circuit authority supports this court's decision that Jordan does have standing to assert her CLA disclosure violation claim. Accordingly, the court declines to follow the footnote dicta in Wiskup.

Having found that Jordan has standing to assert that Toyota violated the CLA's disclosure requirements, the court must now

address the merits of that claim. In count I of her complaint, Jordan alleges that Toyota's lease violates the CLA because it fails "to clearly and fully disclose the early termination penalty and the method for making this determination." (Compl. at P 26.) The relevant portion of the CLA provides:

Consumer lease disclosures. Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a(11). Toyota contends that this allegation fails to state a claim upon which relief can be granted because paragraph 26 of the lease fully discloses the method for calculating the "Amount Due in early Termination."

Jordan first insists that the lease does not properly disclose the early termination penalty because paragraph 26(d) of the lease states that the "Adjusted Capitalized Cost" of the automobile is found in "Paragraph 6" of the lease, when the "Adjusted Capitalized Cost" of the automobile is actually located in paragraph 5 of the lease. Jordan contends that this typographical error incorrectly referring her to paragraph 6 for the "Adjusted Capitalized Cost" in Toyota's lease violates the CLA.

In response, Toyota relies on two cases which held that typographical errors do not violate the TILA, *Veale v. Citibank,*

F.S.B., 85 F.3d 577, 579 (11th Cir. 1996) and *Johnson v. Household Finance Corp., 453 F. Supp. 1327, 1332 (S.D. Ill. 1978).* In Veale, a loan note erroneously specified that it was "payable in 84 installments," but then contradicted itself by suggesting that repayment of the loan required a total of 85 payments. *Veale, 85 F.3d at 580.* The court held that this typographical error did not "rise to the level of a TILA violation particularly when the disclosure statement is correct." Id. Similarly, in Johnson, a mortgage form required the creditor to specify the type of mortgage by typing yes in a box next to either "Chattel Mortgage," "Wage Assignment," or "Real Estate Mortgage." *Johnson, 453 F. Supp. at 1332.* The creditor typed "yes" just outside the box next to "Real Estate Mortgage" and the court held that this typographical error did not violate the TILA. *Id. at 1333.* Based on the holdings of Veale and Johnson, Toyota argues that the error in paragraph 26(d) does not support a failure to disclose violation under the CLA. The court does not agree.

The CLA requires an accurate "statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination." *15 U.S.C. § 1667a*(11). Here, the typographical error in paragraph 26(d) renders the lease's explanation of how to calculate the "Amount Due on Early Termination" inaccurate. Accordingly, Jordan's claim that the typographical error in paragraph 26(d) violates the CLA's disclosure requirements survives a Rule 12(b)(6) motion to dismiss.

Additionally, the cases Toyota relies on cannot control the outcome of this motion to dismiss because both of those cases were decided on a motion for summary judgment. See *Veale, 85 F.3d at 580; Johnson, 453 F. Supp. at 1332.* It may very well be that Jordan cannot survive a summary judgment motion against

her claim that the typographical error violates the CLA. Based on the terms of the lease, Toyota would have a compelling argument that no reasonable juror could find that the typographical error violates the CLA. Similarly, Toyota could assert a bona fide error defense. n5 However, to state a claim, Jordan merely has to show a set of facts that would entitle her to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Gorski v. Troy, 929 F.2d 1183, 1186 (7th Cir. 1991).* Since the CLA is construed broadly and even technical disclosure violations may trigger liability, *Wiskup, 953 F. Supp. at 963; Kedziora v. Citicorp Nat. Servs., Inc., 780 F. Supp. 516, 519 (N.D. Ill. 1991),* the court holds that the existence of a typographical error in Jordan's lease could entitle her to relief under the CLA. Consequently, the court denies Toyota's motion to dismiss count I of Jordan's complaint.

> n5 The CLA incorporates section 1640 of the TILA which provides, in part, that a creditor or assignee may not be held liable under the CLA if he shows by a preponderance of evidence that the violation was unintentional and resulted from a bona fide error despite the existence of procedures to avoid such error. *15 U.S.C.A. § 1640*(c).

In addition to disputing the validity of count I based on the typographical error, the parties devote substantial energy arguing over whether the lease provides sufficient information to enable an average consumer to calculate the "Amount Due on Early Termination." In short, Jordan complains that the lease violates the CLA because the method it discloses for calculating the early termination penalty is too complicated for the average consumer. Jordan also cites two mathematical experts who reviewed the lease and concluded that no average consumer

could perform the mathematical calculations required to determine the "Amount Due on Early Termination."

In support of this argument, Jordan relies on the Second Circuit's opinion in *Lundquist v. Sec. Pac. Automotive Fin. Servs. Corp., 993 F.2d 11 (2nd Cir. 1993).* In that case, the court held that a lease violated the CLA because its formula for calculating the early termination penalty was "confusing, unduly complicated, and unnecessarily convoluted." *Id. at 15.* The Seventh Circuit, however, has rejected Lundquist and held that the "clear and conspicuous manner" requirement under the CLA mandates that a lease's terms be visible, not simple. *Channell v. Citicorp. Nat'l Servs., Inc., 89 F.3d 379, 382 (7th Cir. 1996).* The lease in Channell required the lessor to use the "Sum-of-the-Digits" method to determine the early termination penalty, but it neither defined "Sum-of-the-Digits" nor elaborated on its operation. *Id. at 380.* The plaintiff argued that this method, because it was incomprehensible to an average consumer, violated the CLA's disclosure requirement. *Id. at 383.* The court rejected this argument, noting that the term "manner" refers to the "mode of presentation, not the degree of comprehension." *Id. at 383.*

Meanwhile, in analyzing the phrase "clear and conspicuous", the court determined that lease terms are conspicuous where "a reasonable person against whom it is to operate ought to have noticed it." *Id. at 382* (quoting U.C.C. 1-201(10)). The court elaborated on its reasons for rejecting Lundquist by stating:

The court [in Lundquist] does not explain why the operation of a formula must be simple -- for the Act requires a clear presentation but does not limit the number of variables the lessor may consider. The quoted words "confusing, unduly complicated, and unnecessarily convoluted" lack a source --

they are not quoted from anything. . . It does not appear anywhere in the United States Code or the Code of Federal Regulations.

Id. Thus, under Channell, the court must reject Jordan's arguments that Toyota's lease violates the CLA because it is difficult to calculate the "Amount Due on Early Termination."

The court can appreciate Jordan's reaction to the apparent unfairness of allowing Toyota to use a formula that no reasonable consumer can understand; however, the CLA does not require lessors to disclose understandable methods of calculating early termination penalties. See *Channell, 89 F.3d at 382-83.* Instead, the CLA only requires lessors to disclose "the amount or method of determining any penalty or other charge for ... early termination." *15 U.S.C. § 1667a*(11). In this case, Toyota complied with this requirement by disclosing the method (albeit a very complicated one) it uses to calculate the "Amount Due on Early Termination." Jordan's complaint does not allege that it is impossible to calculate the early termination penalty using the method in Toyota's lease, just that it is difficult. n6 Thus, while Jordan's arguments about the complexity of the method may garner some sympathy, they are legally irrelevant.

n6 In fact, both of Jordan's experts managed to determine the early termination penalty using the method disclosed in the lease.

II. Toyota's Rule 12(b)(6) Motion to Dismiss Count II

In count II of her complaint, Jordan alleges two separate violations of the CLA. Jordan first contends that Toyota violated the disclosure requirements of the CLA by failing to

"properly indicate the payment that was made at the consummation of the lease agreement (i.e., the trade in)." (Compl. at P 28.) Specifically, Jordan argues that paragraph 14(b)(1) of her lease, which lists her "Net Trade In Allowance" as $ 0 violates the CLA because it is an inaccurate disclosure of the value of the 1993 Toyota Corolla she traded in when she leased the 1997 Camry. Toyota contends that Jordan fails to state a claim in count II because Jordan did not own her Corolla. Therefore, Toyota argues that Jordan's trade in did not have any value because she had no equity in her 1993 Corolla, which she had also leased. The court rejects Toyota's argument.

Under Regulation M, the regulations written by the Federal Reserve Board to implement the provisions of the CLA, lessors subject to the CLA must disclose "any net trade-in allowance ...." 12 C.F.R. § 213.4(b). n7 Jordan recognizes that she did not own her 1993 Corolla when she traded it in, but maintains that her Corolla had value because she could have purchased the Corolla for an amount less than its market value. Specifically, Jordan's Corolla lease entitled Jordan to purchase the Corolla for the "residual value" of the automobile -- an amount Jordan alleges is less than the actual market value of the car. Assuming these facts to be true, Jordan states a claim for failure to disclose the net trade in allowance of her Corolla. Even though Jordan did not own the Corolla, the Corolla did bear value independent of its market value and Jordan may have been entitled to apply this value toward the lease of her 1997 Camry.

n7 Jordan cites to 12 C.F.R. § 213.4(g)(2) in support of her argument. Regulation M has, however, apparently been restructured. Section 213.4(g)(2) addresses "early-termination notice" and has nothing to do with disclosing trade in values.

Toyota next argues that even if Jordan's Corolla did bear a trade in value, she fails to state a claim upon which relief can be granted because *15 U.S.C. § 1641* (a) protects Toyota from liability. Jordan correctly counters this argument by pointing out that *15 U.S.C. § 1641* (a) is part of the TILA statute, not the CLA. Jordan goes on to correctly observe that Regulation M imposes a broader scope of liability on assignees than does *15 U.S.C. § 1641*(a). Specifically, under the Official Staff Commentary to Regulation M, 12 C.F.R. Pt. 213.2-2(h)(3), "an assignee may be a lessor for purposes of the regulation in circumstances where the assignee has substantial involvement in the lease transaction." Id. (citing *Ford Motor Credit v. Cenance, 452 U.S. 155, 68 L. Ed. 2d 744, 101 S. Ct. 2239 (1981)).* In contrast, the TILA allows suits against assignees "only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement ...." *15 U.S.C. § 1641*(a). Applying the broader standard of assignee liability in this case, the court cannot dismiss Jordan's allegation that Toyota violated the CLA by failing to disclose the value of her trade in vehicle on her lease. Accordingly, the court denies Toyota's motion to dismiss this claim.

In her second claim in count II, Jordan contends that Toyota's lease violates the CLA, *15 U.S.C. § 1667a*(4), and Regulation M, 12 C.F.R. § 213.4(d) n8 because it does not "disclose both a total of 'other' charges and an itemization of these charges." (Compl. at P 29.) The provision of Regulation M governing disclosure of "other" charges requires Toyota to disclose:

the total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments. Such charges include the amount of any liability the lease imposes upon the lessee at the end of the lease term; the

potential difference between the residual and realized values referred to in paragraph (k) of this section is excluded.

12 C.F.R. § 213.4(d).

n8 The parties cite to 12 C.F.R. § 213.4(g)(5) regarding their dispute over these "other" charges. The most recent version of Regulation M, however, designates § 213.4(d) as the section regulating other charges. The court will use the most current citation.

Toyota seeks to have this claim dismissed because any "other" charges in its lease are incorporated into Jordan's monthly payments and therefore comply with the requirements of 12 C.F.R. § 213.4(d). Jordan, however, emphasizes that the lease violates § 213.4(d) because the lease does not clearly indicate which other charges are actually included in the monthly payments. The court agrees with Toyota's assessment of Regulation M and the lease's terms and therefore dismisses this claim.

Jordan is correct that the lease fails to distinguish between the charges that are incorporated into the monthly payments and those charges which are not included in the monthly payments. However, Jordan has not cited any provision of the CLA or Regulation M that requires a lessor to make such a distinction. Rather, § 213.4(d) simply requires lessors to disclose "the total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments." 12 C.F.R. § 213.4(d) (emphasis added). Under Regulation M, if a charge is included in the periodic payment, the lessor does not have to separately itemize and disclose the total amount of "other" charges. This regulation seems to assume that consumers will expect lessors to include all lease charges in the

periodic payment. Section 213.4(d) therefore requires lessors to itemize and total only those charges that are not included in the monthly payment. In this case, Jordan fails to identify any charges in her lease that are not included in the periodic payment. Because the lease complies with 12 C.F.R. § 213.4(d), the court dismisses this claim for failure to state a claim upon which relief can be granted.

III. Toyota's Motion to Dismiss Punitive Damages Claim

Highlighting the fact that the CLA does not provide any basis for punitive damages, Toyota moves to dismiss Jordan's requests for punitive damages in paragraphs 26(d) and 29(d) of her complaint. Jordan has not responded to Toyota's motion to dismiss her punitive damage claims. Because the CLA does not authorize punitive damages and Jordan has not opposed the motion, the court grants Toyota's motion to dismiss Jordan's claims for punitive damages.

IV. Motion for Summary Judgment and Motion to Strike

Possibly misapprehending both the scope and strength of her claim in count I, Jordan asks the court to enter summary judgment in her favor on this claim. As the court explained, under *Channell v. Citicorp Nat'l Servs., Inc., 89 F.3d 379, 382-83 (7th Cir. 1996)*, Jordan's arguments concerning the difficulty of calculating the early termination penalty have no place in this lawsuit. Additionally, Jordan's arguments concerning the typographical error in her lease do state a claim, but do not appear to be very strong and will require additional discovery to fully evaluate. Accordingly, Jordan's motion for summary judgment is premature and the court therefore denies her motion without prejudice at this time. If she wishes to do so, Jordan may reassert her motion for summary judgment when the factual record is properly developed. Since the court denies

Jordan's motion for summary judgment without prejudice, the court denies Toyota's motion to strike as moot.

Conclusion

Toyota's motion to dismiss counts I and II of Jordan's complaint [doc. 18-1] is granted in part and denied in part. The court denies Toyota's motion to dismiss count I and Jordan's claim in count II that Toyota failed to disclose the trade in value of her old car. However, the court dismisses that part of count II which alleges that Toyota improperly disclosed "other" charges. The court also denies Jordan's motion for summary judgment on count I of her complaint [doc. 21-1] without prejudice because it is premature. Finally, the court denies Toyota's motion to strike Jordan's cross-motion for summary judgment [doc. 19-1] as moot. The parties should discuss settlement of this case before the next court date.

ENTER:

Ann Claire Williams,

Judge

Dated: FEB 24 1999

CLAUDINE JORDAN, on behalf of herself and all others similarly situated, *Plaintiff*,

vs.

SCHAUMBURG TOYOTA and TOYOTA MOTOR CREDIT CORPORATION, *Defendants.*

No. 97 C 6697

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2000 U.S. Dist. LEXIS 5960

April 25, 2000, Decided

April 26, 2000, Docketed

MEMORANDUM AND ORDER

Two claims against Toyota Motor Credit Corporation (Toyota) survived Judge Williams' February 24, 1999, comprehensive ruling on Toyota's motion to dismiss. Toyota now moves for summary judgment, and we grant those motions. Conversely, we deny plaintiff's motion for summary judgment.

Both claims are based upon the Consumer Leasing Act, *15 U.S.C. § 1667 et seq.* (CLA). The first is that the disclosure in the lease of the "Amount Due on Early Termination" states, in part, "d. The Adjusted Capitalized Cost (Paragraph 6)" and the "Adjusted Capitalized Cost" actually appears in paragraph 5 of the lease ("5. Adjusted Capitalized Cost"). Paragraph 6 begins as follows: "6. Residual Value." Plaintiff concedes that she

realized that the actual "Adjusted Capitalized Cost" was found in paragraph 5. She argues, however, that defendant has not proved the error was a typographical error or that it has established a *bona fide* error defense. We think it clearly is a typographical error -- no other explanation suggests itself and plaintiff obviously so regarded it, as she understood "6" should have been "5." The CLA requires technical compliance, and a plaintiff need not prove she was misled by an inaccurate disclosure. If, however, the meaning is so readily apparent that no reasonable juror could conclude that a reasonable consumer would be misled and would, rather, fully understand that "6" really referred to "5," then the disclosure is not inaccurate and no violation has occurred. And we believe that is the situation here.

The other claim is the lease assigns no value to a '93 Toyota Corolla trade-in. The '93 Toyota was still under lease, with two months to go, and without any right of early termination. At the end of that lease (which was through another dealer), plaintiff was obligated to return that vehicle, which would then have an estimated residual value of $ 7,064.20. At the time of the 1997 lease the parties agreed that the 1993 vehicle had an estimated trade-in value of $ 7,583.47. Schaumburg Toyota agreed to make the last two payments on the 1993 lease, $ 253.80 each or a total of $ 507.60. Thus, contends Toyota, the value of the vehicle at the end of the lease, which plaintiff was obligated to surrender under the 1993 lease, was $ 7,064.20, and Schaumburg Toyota was picking up $ 507.60 in payments, a total of $ 7,571.80. That is $ 11.67 less than the estimated trade-in value. Thus, says Toyota, the actual trade-in value of the 1993 Toyota was, after those offsets, zero, and the disclosure is accurate, the $ 11.67 being *de minimus*.

Plaintiff disagrees. She contends that the trade-in value should have been disclosed as $ 519.27, the difference between $ 7,583.47 and $ 7,064.20, and the payments by Schaumburg

Toyota should have been disclosed on the face of the lease as "(9) Other $ 507.60" in paragraph 13, "Total Payment Due at Lease Signing." Perhaps it could have been done that way, although, because plaintiff did not own the 1993 Toyota and, more importantly, because plaintiff was not obligated to pay $ 507.60 at lease-signing, it could well be argued that the disclosure favored by plaintiff would have been inaccurate. In any event, we conclude that the disclosures made were an appropriate way of documenting a transaction everyone understood -- except for $ 11.67. We agree that it is *de minimus*, but it should be refunded to plaintiff (although we note that plaintiff has not produced any evidence that Toyota had a substantial involvement in the lease transaction).

The final claim, that the paragraph 14 "(1) Capitalized Cost Reduction" should have been filled in as "O" rather than "NA," was never alleged, and it is too late now. Moreover, while a figure may be what is supposed to go in that blank, *see Myers v. The Hexagon Co., L.L.C., 54 F. Supp. 742, 54 F. Supp. 2d 742, 755 (E.D. Tenn. 1998)*, "NA" can hardly be termed inaccurate.

JAMES B. MORAN

Senior Judge, U.S. District Court

April 25, 2000

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the court enters summary judgment in favor of defendants,

SCHAUMBURG TOYOTA ET AL. And against plaintiff, CLAUDINE JORDAN.

Date: 4/25/2000

Claudine W. Jordan, on behalf of herself and a class of others similarly situated, *Plaintiff-Appellant*,

v.

Toyota Motor Credit Corporation, *Defendant-Appellee*.

No. 00-2327

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

236 F.3d 866; 2001 U.S. App. LEXIS 210

November 27, 2000, Argued

January 9, 2001, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 6697. Ann Claire Williams and James B. Moran, Judges.

Before Bauer, Posner, and Easterbrook, Circuit Judges.

[*866]

Easterbrook, *Circuit Judge*. Five years ago we held that a consumer lease need not explain the "sum-of-the-digits method" for computing an early termination charge; it is enough to give the method's name. *Channell v. Citicorp National Services, Inc., 89 F.3d 379, 382-83 (7th Cir. 1996)*. The portion of the Truth in Lending Act applicable to leases, see *15 U.S.C. § 1667a*, requires the lessor's method for determining any early termination [*867] charge to be disclosed in a "clear and conspicuous manner". Emphasizing the word "manner,"

Channell concluded that the required information must stand out but need not be simple enough for ordinary customers to grasp. In the current case a class of auto lessees contends that a lease's reference to the "constant-yield method" of calculating an early termination charge is too abstruse to be "clear." Plaintiffs allow that the language is "conspicuous" but deny that it is "clear" unless the average consumer can understand how the method works. Judge Williams thought this argument foreclosed by *Channell* and dismissed the claim. *1999 U.S. Dist. LEXIS 2553* (N.D. Ill. Feb. 24, 1999). After Judge Williams joined this court, what was left of the case fell to Judge Moran, who dismissed the remaining allegations, *2000 U.S. Dist. LEXIS 5960* (N.D. Ill. Apr. 25, 2000), producing an appealable judgment.

Plaintiffs recognize that *Channell* is against them and ask us to overrule that decision. We decline, and not only because of *stare decisis*. *Channell* noted that the Federal Reserve (which has regulatory authority under the TILA) had proposed a regulation that would explicitly permit lessors to disclose a method by giving its name rather than the details of its calculation. Since *Channell*, that regulation has been adopted. See 12 C.F.R. Part 213.4(g) (2000) and the Official Staff Commentary. The Federal Reserve recognized that a name may be superior to a narration, for application can be complex--a point exemplified by the constant-yield method, which employs the calculus (while the sum-of-the-digits method is algebraic). Lessees who know the name of the method can use that knowledge to engage in comparison shopping; rival lessors can trumpet the benefits of their methods. (The constant-yield method is more favorable to lessees than is the sum-of-the-digits method.) We agree with *Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214, 220 (3d Cir. 2000)*, that the word "clear" could mean "easily understood" or some variant. See also *Smith v. Cash Store Management, Inc., 195 F.3d 325,*

327-28 (7th Cir. 1999). Still, this does not lead us to depart from the conclusion of *Channell* that how far to go in the direction of requiring complex concepts to be presented in easy-to-follow language (if that is possible at all) is a question for the Federal Reserve. Cf. *Smith v. Check-N-Go of Illinois, Inc., 200 F.3d 511 (7th Cir. 1999).* The Fed has so far blessed disclosure by name, because it believes that nothing better is achievable at acceptable cost. That decision is entitled to judicial respect. *Applebaum* held that a reference by name to the "constant-yield method" satisfies the TILA and the Fed's regulations, even if the average consumer hasn't a clue what the "constant-yield method" entails.

Still, plaintiffs insist, even if we adhere to *Channell* and follow *Applebaum* (as we do), Toyota's lease flunks the TILA because it does more than give the method's name. Two lengthy paragraphs attempt to explain how Toyota calculates early-termination charges. We say "attempt" because the paragraphs are incomplete; they do not use the language of calculus and so are doomed to miss the mark. Plaintiffs filed affidavits from a mathematician and a person with experience in the auto industry who conclude that it is not possible to use the language of the lease as a step-by-step formula that leads to a precise calculation of the early-termination charge; the affiants slogged through the lease's language but in the end each had to draw on some personal knowledge to complete the exercise. Even if using an unelaborated name is proper, plaintiffs insist, a gobbledygook explanation of that method entitles them to damages.

This supposes, however, that a better explanation is available, and that Toyota chose to obfuscate when it could have clarified. At oral argument plaintiffs' counsel conceded that he had been unable to come up with a better explanation; we can't think of one either, other than using equations that would flummox all but a handful of readers. Perhaps a lessor

could not only satisfy its statutory obligation but also assist consumers by giving, not an exegesis, but the location of a site in the [*868] Internet that would perform the calculations for any inquiring lessee. Neither the TILA nor the Fed's regulations call for information to be delivered electronically, however. Because the written paragraphs are no worse than the unelaborated name (they do not throw readers off the scent), and because both the name and the exposition will prove equally indigestible to most lessees, adding the explanation did not produce a violation of the TILA.

Affirmed

Supreme Court, U.S.
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(2)

No. 00-1540

IN THE

Supreme Court of the United States

CLAUDINE W. JORDAN, on behalf of herself and all others similarly situated,

Petitioner,

v.

TOYOTA MOTOR CREDIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Toyota Motor Credit Corporation, is a wholly owned subsidiary of Toyota Motor Sales, U.S.A.

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REASONS FOR DENYING THE WRIT

The Petitioner's request for writ of certiorari should be denied because no conflict exists among the United States Courts of Appeals. Furthermore, the Respondent, Toyota Motor Credit Corporation ("TMCC"), objects to the question presented for review by the Petitioner because it does not accurately represent the holding of the Seventh Circuit. Specifically, the Petitioner's chief contention is that the Seventh Circuit incorrectly held that the clear and conspicuous disclosure requirement of the Consumer Leasing Act (15 U.S.C. § 1667a(11)) lacks an understandability component and only requires that lease terms be visible to a consumer. The Petitioner contends that this holding is contrary to the Third Circuit's holding in *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3646 (Mar. 23, 2001) (No. 00-1484), which held that the word "clear" also meant reasonably understandable.

The Petitioner's characterization of the Seventh Circuit's opinion is inaccurate. Specifically, in holding that TMCC's early termination provision did not violate the Consumer Leasing Act ("CLA"),[1] the Seventh Circuit expressly agreed with *Applebaum* "that the word 'clear' could mean 'easily understood' or some variant." (A. 25). The court further reasoned that it was required to follow the cardinal principle of statutory construction, *i.e.*, the degree to which complex concepts must be presented in "easy-to-follow language (if that is possible at all) is a question for the Federal Reserve." (A. 26). Thus, no conflict exists between the Seventh and Third Circuits.

---

1. The Consumer Leasing Act is a part of the Truth in Lending Act ("TILA") and thus, they will be used interchangeably throughout this brief in opposition.

Furthermore, no conflict exists between the Seventh Circuit and the Second Circuit's opinion in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), *cert. denied*, 510 U.S. 959 (1993). The *Lundquist* court held that the early termination provision which referenced the "constant yield" method was "confusing, unduly complicated and unnecessarily convoluted," and thus violated the CLA. *Lundquist* cited no authority for its holding and contained no analysis. In 1996, three years after *Lundquist* was decided, the Federal Reserve Board issued the final version of its revisions to Regulation M and expressly approved reference to the "constant-yield" method of calculating early termination in a consumer lease. 12 C.F.R. § 213, Supp. I, 213.4(g)(1). The Federal Reserve Board approved this type of disclosure even though the average consumer would not comprehend the math involved. Therefore, *Lundquist* is outdated and is no longer relevant to a discussion of the CLA.

Additionally, the petition for writ of certiorari should be denied because the Petitioner failed to raise several arguments in the district court or the Seventh Circuit. The Petitioner also conceded certain arguments during oral argument before the Seventh Circuit which are inconsistent with arguments made before this Court, and which will inhibit this Court's review of the issues raised in the Petitioner's brief. Indeed, the Petitioner's brief filed in this Court contains internal inconsistencies. For all of these reasons and for those set forth below, the petition for writ of certiorari in this case should be denied.

BACKGROUND

Petitioner's "Statement of the Case" omits information. Accordingly, the Respondents have set forth below a brief background to supplement the facts set forth in the Petitioner's Brief.

In February 1997, the Petitioner turned over her leased 1993 Toyota Corolla to a car dealer, Schaumburg Toyota ("Schaumburg"). (DE 1). She then executed a new 36-month lease with Schaumburg for a 1997 Toyota Camry. *Id.* The lease was then assigned to Toyota Motor Credit Corporation ("TMCC"). TMCC provides leasing, loan financing, and other financial services to car buyers.

The Petitioner's 1997 lease provided two options for terminating the lease before the conclusion of the 36-month lease term: (1) the Petitioner could purchase the Camry and pay TMCC the Amount Due on Early Termination or (2) she could pay the Amount Due on Early Termination minus the Fair Market Value of the Camry. (DE 40, Ex. C). The lease also provided the method by which the Amount Due on Early Termination is calculated. *Id.* The lease referenced the "constant yield" method as permitted by the Federal Reserve Board. Specifically, the lease provided:

> 26. **Amount Due on Early Termination.** The Amount Due on Early Termination is the sum of a. through d. minus e.:
>
> a. Any unpaid Monthly Payments then due;
>
> b. Any other amounts you are obligated to pay under this Lease;

c. Any official fees and taxes owing, or imposed in connection with lease termination;

d. The Adjusted Capitalized Cost (Paragraph 6);

e. All depreciation amounts in the Base Monthly Payments that have come due (Paragraph 28).

Paragraph 28 of the lease provides, in relevant part:

28. **Depreciation Amounts:** Each Base Monthly Payment consists of Lease Charges and depreciation. Lease Charge is earned by us on a "constant yield" basis. The Lease Charge part of each Base Monthly Payment is determined by:

a. Adding the remaining depreciation balance and the Residual Value;

b. Subtracting from that sum an amount equal to 1 Base Monthly Payment; and

c. Multiplying the difference determined in step b. above by the constant rate which will amortize the Total Depreciation over the Lease Term by the payment of the Base Monthly Payments.

Cross referencing in this manner to avoid unnecessary text is expressly permitted by the Federal Reserve Board as shown by the Commentary to Regulation M, which governs the interpretation of the CLA. *See* Comment 2 Reg. M, 213.4(a)-3.

On September 23, 1997, the Petitioner sued Schaumburg and TMCC for alleged violations of the disclosure requirements of the CLA. 15 U.S.C. § 1667a(11). In Count I, the Petitioner claimed that her new lease did not clearly and fully disclose the early termination penalty in violation of the CLA. (DE 1, at 5). In Count II, she alleged that TMCC violated the CLA by failing to disclose the trade-in value of her leased 1993 Toyota Corolla, as well as certain unspecified "other" charges. (DE 1, at 6). Counts III and IV were directed at Schaumburg only. Ultimately, the Petitioner settled with Schaumburg and the district court dismissed the claims against Schaumburg with prejudice. (DE 27).

TMCC moved to dismiss Counts I and II of Petitioner's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. With respect to Petitioner's early termination claim in Count I, TMCC argued that the lease disclosure fully complied with the CLA and the Federal Reserve Board's Regulation M. (DE 18, at 2; DE 24 at 4-6). TMCC also argued for the dismissal of the remaining claims against it. (DE 18 & 24).

In response, the Petitioner filed a cross-motion for summary judgment on Count I of her complaint. (DE 21, 25). The Petitioner maintained that TMCC's motion to dismiss was, in actuality, a motion for summary judgment. (DE 21, at 6, n.7). TMCC moved to strike the Petitioner's cross-motion for summary judgment because it was premature and because dismissal under Rule 12(b)(6) was appropriate. (DE 19).

On February 26, 1999, the district court entered its order granting, in part, TMCC's motion to dismiss Counts I

and II, and denying the Petitioner's motion for summary judgment as premature. The district court held that under *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379, 382 (7th Cir. 1996), the Petitioner failed to state a claim for violation of the CLA based upon the disclosure of the early termination methodology in the lease. *Jordan v. Schaumburg Toyota*, No. 97 C 6697, 1999 WL 116224, at *6-7 (N.D. Ill. Feb. 26, 1999). The court also held that the Petitioner failed to state a claim in Count II for the failure to accurately disclose unspecified "other" charges, and that the Petitioner could not obtain punitive damages against TMCC because the CLA does not authorize such damages. The only two surviving claims concerned the alleged typographical error in the lease (Count I) and the alleged failure to disclose the trade-in value of the leased 1993 Corolla (Count II).

Following discovery, TMCC moved for summary judgment on the two remaining claims, *i.e.*, typographical error (Count I) and trade-in (Count II). (DE 39, 40). The Petitioner responded by filing a cross-motion for summary judgment. (DE 41, 42).

On April 25, 2000, the district court entered summary judgment in favor of TMCC and against the Petitioner. (DE 47-48). With respect to the typographical error, the district court noted that the Petitioner admitted that she realized that the actual "Adjusted Capitalized Cost" was found in paragraph 5, not paragraph 6. (A. 20-21). The court reasoned that the meaning was so readily apparent that no reasonable juror could conclude that a reasonable consumer would be mislead by the typo, and thus no violation of the CLA occurred. (A. 21). The district court also held that the manner in which TMCC disclosed the trade-in value did not violate the CLA. (A. 22).

The Petitioner timely appealed to the Seventh Circuit and raised only one issue: whether the district court properly dismissed the early termination aspect of Count I. The Petitioner conceded that the early termination language in TMCC's lease was conspicuous, but she denied that it was clear unless the average consumer can understand how the method works. For the reasons set forth below, the Seventh Circuit correctly rejected the Petitioner's arguments and affirmed the district court's dismissal of her complaint.

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN THE UNITED STATES COURTS OF APPEALS IN INTERPRETING THE CONSUMER LEASING ACT.

As shown by a careful reading of *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), *Jordan v. Toyota Motor Credit Corp.*, 236 F.3d 866 (7th Cir. 2001), *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000) and *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), no conflict among the United States Courts of Appeals exists. The Petitioner casts the Seventh Circuit's opinion in this case as approving the disclosure of early termination provisions that are not comprehendible or accurate. (Petition at 6). This is not true. The Seventh Circuit properly construed the CLA by following the applicable Federal Reserve Board regulations and commentary regarding early termination provisions in leases. Furthermore, no conflict exists because the Seventh Circuit expressly agreed with the Third Circuit's decision in *Applebaum*. Additionally, the Second Circuit's 1993 decision in *Lundquist* has become obsolete given the evolution of the Federal Reserve Board's regulations and commentary which post-date *Lundquist*.

A. The Federal Reserve Board Has Expressly Approved The Use Of Early Termination Terms That Are Not Within The General Understanding Of The Average Consumer, And This Decision Is Entitled To Deference.

The Seventh Circuit's decision conforms with the purpose of the TILA. The purpose of the TILA is to promote the informed use of credit and to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652 (1973); *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790 (1980). This Court has cautioned that where reasonable minds may differ as to appropriate remedial measures courts should defer to the agency to whom Congress has delegated authority — in the case of the TILA, the Federal Reserve Board. *Id.* Congress gave the Federal Reserve Board the power to construe the TILA and enact regulations because the Board has the necessary experience, resources, and administrative expertise to monitor the operation of the TILA. *Id.*

This Court has discouraged judges from superseding Congress or the Federal Reserve Board by embellishing on the regulatory scheme set up by the Board. *Milhollin*, 444 U.S. at 564. The legislative history of the TILA evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than through piecemeal litigation. *Id.* at 566. As this Court has noted:

> [S]triking the appropriate balance is an empirical process that entails investigation into consumer

> psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.

Id. at 568-69.

Based on its power under the TILA, the Federal Reserve Board has expressly approved reference to the "constant yield" method as part of an early termination equation in a consumer lease, even though the average consumer has no idea what that method may entail. The Board has refused to limit the substantive calculations that lessors may use for calculating early termination in a lease, and thus has not required lessors to use simple math terms that average consumers comprehend. As the Federal Reserve Board regulations illustrate, a vehicle lessee voluntarily enters into the market place and has a choice about whether to engage in comparison shopping for a leased vehicle. Because the nature of leasing is inherently math based, and must account for the time-value of money, the CLA, Regulation M, and the corresponding decisional law have recognized that a consumer's comprehension of all math terms need not be complete. Indeed, consumer comprehension of all math terms would be an impossibility.

B. In This Case And *Channell* The Seventh Circuit Properly Interpreted The Consumer Leasing Act and Regulation M Consistent With The Third Circuit's Decision in *Applebaum v. Nissan Motor Acceptance Corporation.*

Based on the above principles, the Seventh Circuit in this case and in *Channell* held that the early termination provisions at issue contained disclosures that were adequate for purposes of the CLA, even though only a rare consumer would be able to do the math involved. In each case, the Seventh Circuit considered the Federal Reserve Board's revisions to Regulation M and the Board's decision to permit reference to complex mathematical terms. *See, e.g.*, 60 Fed. Reg. 48752, 48756 (Sept. 20, 1995); *Channell*, 89 F.3d at 382-83; *Jordan*, 236 F.3d 866. At the time of *Channell* in 1996, proposed revisions to Regulation M were published for comment and were under consideration. By the time the present case came before the court in 2000/2001, the revisions had been approved and thus had become law. In each case, the Seventh Circuit merely applied disclosure methods approved by the Federal Reserve Board to the early termination provisions at issue. In doing so, the Seventh Circuit served an appropriate judicial function by deferring to the Federal Reserve Board's expertise with respect to consumer leasing practices, and by refusing to place substantive restrictions upon the manner in which a lessor may provide for early termination under a lease.

Specifically, in *Channell*, the Seventh Circuit held that the reference to the "sum-of-the-digits" method in an early termination provision of a lease satisfies the CLA's requirement that early termination disclosures must be clear and conspicuous. 15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(2). The *Channell* court reasoned that according to the Federal Reserve Board,

the "clear and conspicuous" requirement of section 1667a(11) of the CLA does not require a lease's terms to be simple. *Id.* at 382. The lease in *Channell* required the lessor to use the "sum-of-the-digits" method to determine the early termination penalty, but it did not define "sum-of-the-digits" and it did not explain how this term operated. *Id.* at 380. The *Channell* court noted that the term "manner" in section 1667a of the CLA refers to the "mode of presentation, not the degree of comprehension." *Id.* at 382. The court further noted that the Federal Reserve Board revisions to Regulation M that were under consideration expressly permitted lessors to give a full description of its early termination method, and, in doing so, to include a reference to the name of the generally accepted method of computing the unamortized gross or capitalized cost (also known as the "adjusted lease balance") portion of the early termination charge. *Id.*

In reaching its conclusion that the early termination provision satisfied the CLA, the Seventh Circuit analogized the lease provision to the Uniform Commercial Code ("UCC"), which requires the conspicuous disclosure of a disclaimer of the warranty of merchantability "even if the average consumer hasn't the vaguest idea what a 'warranty of merchantability' entails." *Id.* at 382. The *Channell* court also observed that "[a] reference in a lease to the sum-of-the-digits method is not highly informative, but it is more than the Board requires in loan transactions." *Id.* Even though the early termination provision at issue in *Channell* was not simple, the court found that it satisfied the CLA because it conformed to the guidelines set forth by the Federal Reserve Board.

Similarly, in this case the Seventh Circuit followed *Channell*, agreed with *Applebaum*, and held that TMCC

complied with section 1667a(11) of the CLA by disclosing the method it uses to calculate the "Amount Due on Early Termination," even though that method may be complicated. The court reasoned that the Federal Reserve Board does not require lessors to make early termination calculations easy or decipherable by the average consumer. The Seventh Circuit observed that the Federal Reserve Board is charged with the responsibility of determining the degree to which it is necessary for lessors to present complex mathematical concepts in easy to follow language (if that is possible). (A. 26). The Seventh Circuit reasoned that the Federal Reserve Board decided that the reference to the name — "constant-yield method" — satisfies the TILA and the Board's regulations, "even if the average consumer hasn't a clue what the 'constant yield method' entails." (A. 26). It is beyond the role of the judiciary to second guess this decision.

The Seventh Circuit also rejected the Petitioner's argument that TMCC's lease violates the TILA because it does more than give the method's name. The court reasoned that the Petitioner's argument presumed that a better explanation of complex mathematical terms could be crafted. The Seventh Circuit seized upon the concession the Petitioner made during oral argument–that he was unable to craft a better explanation of early termination than the one provided by TMCC. (A. 26). The Seventh Circuit then recommended that consumers perhaps would be assisted by being given the location of an Internet site that would perform the calculations for the inquiring lessee. The court, however, also observed that neither the TILA nor the Federal Reserve Board's regulations require leasing information to be delivered to consumers electronically in this fashion. In sum, the court concluded that the added explanation provided by

TMCC was not substantively any more confusing to a consumer than the methods already approved by the Federal Reserve Board — namely, the use of an unelaborated name of a calculation such as the "constant yield" method. Therefore, the court held that no violation of the TILA occurred. (A 25-26).

As in the present case, in *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000), the Third Circuit ruled that the reference to "the Constant Yield method at the rate implicit in the lease" in the early termination clause did not violate the CLA even though average consumers have no idea what this entails. The court explained the word "clear" in section 1667a means that the provision must be reasonably understandable. *Applebaum*, 226 F.3d at 221. In further analyzing the application of this standard, the Third Circuit explained that the CLA and Regulation M require disclosure in a form that is "reasonably understandable" in light of the inherent difficulty or complexity of the method described and thus they do not necessarily demand disclosure in a form that the average consumer can understand. *Applebaum*, 226 F.3d at 221.

The Third Circuit further reasoned that methods used in calculating early termination penalties involve math that is well beyond the understanding of the average consumer. Thus, if the early termination penalty had to be capable of being explained in a way that the average consumer could understand, these provisions would, in effect, impose improper substantive restrictions on such methods. *Applebaum*, 226 F.3d at 221. This rationale is logically sound and entirely consistent with the Federal Reserve Board's regulations and its refusal to place substantive limitations on lessors' early termination provisions.

Ultimately, the Third Circuit found that the early termination clause at issue there violated the CLA because it did not disclose the amount of the residual value. TMCC's lease in this case does not suffer from this shortcoming. In this respect, *Applebaum* is distinguishable from this case, and certainly does not present a conflict with the Seventh Circuit as the Petitioner wrongly suggests.

C. The Second Circuit's Opinion In *Lundquist* Is Outdated, Limited To Its Facts And Poses No Conflict With The Decisional Law Of The Seventh And Third Circuits.

The Petitioner contends that the Second Circuit Court of Appeal's decision in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993) conflicts with the Seventh Circuit's decision in this case and in *Channell*. The Petitioner overlooks the fact that the 1993 decision in *Lundquist* preceded the evolution of leasing practices and the Federal Reserve Board's response through its amendments after *Lundquist* was decided. The *Lundquist* court held that the early termination provision which referenced the "constant yield" method was "confusing, unduly complicated and unnecessarily convoluted," though it cited no authority for its holding and contained no analysis. In 1996, three years after *Lundquist* was decided, the Federal Reserve Board issued the final version of its revisions to Regulation M, and gave the following explanation of the changes:

> The proposed rule noted that a U.S. Court of Appeals case, *Lundquist v. Security Pacific Automotive Services Corp.*, 993 F.2d 11 (2nd Cir.), *cert. denied*, 510 U.S. 959 (1993), caused

> lessors concern in determining the requirements for disclosing their early termination provisions. In that case, the court held a lessor liable for violating the "reasonably understandable" standard for disclosure under Regulation M; the lessor had an early termination formula that the court found to be overly complex and beyond the understanding of the average consumer. Many lessors believe that, given the complexity of modern automobile lease transactions, it is difficult to describe every part of an early termination formula in terms clearly understandable to consumers.
>
> * * * *
>
> Given the complexity of the methods involved, however, a lessor is permitted — in giving the full description of its early termination method — to refer by name to a generally accepted method of computing the adjusted lease balance (also known as the unamortized capital cost) for purposes of the early termination charge. For example, a lessor may state that the "constant yield" method will be utilized in determining the unamortized portion of the gross capitalized cost . . .

61 F.R. 52246, 52252 (10/7/96) (emphasis added). Then, when the Board issued its Official Staff Commentary to the revised Regulation M, it specifically stated: "Descriptions that are full, accurate, and not intended to be misleading will comply with § 213.4(g)(1), even if the descriptions are complex." 62 F.R. 16053, 16061 (4/4/97) (emphasis added).

In light of the Federal Reserve Board's changes to Regulation M and its express consideration of *Lundquist*, the Second Circuit's holding in *Lundquist* is very limited and clearly distinguishable from the present case. As the Seventh Circuit recognized in *Channell*, "[f]or current purposes, it is enough to say that *Lundquist* does not analyze or address the question whether the Act and Regulation M permit a lessor to name a method without providing an elaboration of the method's operation. We hold that it does." *Channell,* 89 F.3d 379, 383 (emphasis added). For these reasons, it is clear that no conflict exists between the Seventh and Second Circuit's interpretations of the CLA, Regulation M, and the Federal Reserve Board's commentary. To the contrary, the *Lundquist* decision is simply obsolete and irrelevant.

II. REVIEW OF THIS CASE WOULD BE INHIBITED BY WAIVED ARGUMENTS AND INTERNAL INCONSISTENCIES IN THE PETITION.

In addition to the fact that no conflict exists among the United States Courts of Appeals, the petition for writ of certiorari should be denied because inconsistent arguments, incomplete allegations, and waiver plague the record to such a degree that this Court's review of this case would be unduly inhibited.

For example, before the Seventh Circuit, the Petitioner argued that the clear and conspicuous requirement of the CLA has an "understandability" component. (Petitioner's Seventh Circuit Brief at 21). In place of the standards for clear and conspicuous set forth in *Channell*, the Petitioner suggested a standard that is completely unclear, *i.e.*, that the early termination method must be "somewhat understandable."

(Petitioner's Seventh Circuit Brief at 10). Indeed, at oral argument before the Seventh Circuit the Petitioner conceded that she could not craft a more understandable method of explaining the early termination provision at issue. (A. 26). The Petitioner's inability to articulate a standard before the Seventh Circuit underscores the fact that the Petitioner seeks to substantively limit TMCC's leasing practices. The Petitioner's concession and different argument before the Seventh Circuit poses a waiver problem.

Furthermore, on the one hand the Petitioner contends that it is "impossible" to calculate the early termination provision in her lease. (Petition at 12). Yet, on the other hand the Petitioner contends that indeed it is possible to reach the correct answer for early termination using esoteric techniques of differential calculus, such as Newton's Method. (Petition at 13). The Petitioner continues to challenge the complexity of the lease's early termination methodology despite the fact that the Federal Reserve Board clearly permits complex mathematical equations to be used in leasing practices.

Additionally, under the revised Commentary to Regulation M, if a lessor discloses only its method of calculating early termination liability, the lessor must provide a written explanation of the method upon request from the lessee. In this case, the Petitioner has never alleged that she asked for an explanation of the early termination calculation. *See* 62 F.R. 16053, 16061 (4/4/97). The Petitioner likewise has never alleged that TMCC's disclosure prevented her from comparison shopping for another leased vehicle or that she even attempted to comparison shop. Thus, the Petitioner's allegations appear incomplete. For these additional reasons, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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